Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-810

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

MICHIGAN UNITED FOOD AND COMMERCIAL WORKERS UNIONS AND FOOD EMPLOYERS HEALTH AND WELFARE FUND, and the BOARD OF TRUSTEES thereof; and MICHIGAN UNITED FOOD AND COMMERCIAL WORKERS UNIONS DRUG AND MERCANTILE EMPLOYEES WELFARE FUND, and the BOARD OF TRUSTEES thereof,

Petitioners,

v.

NANCY A. BAERWALDT, COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN; JEAN CARLSON and THOMAS PIERSON, DEPUTY COMMISSIONERS OF INSURANCE OF THE STATE OF MICHIGAN; and THE BUREAU OF INSURANCE OF THE STATE OF MICHIGAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

THEODORE SACHS
Attorney for Petitioners
Sachs, Nunn, Kates, Kadushin, O'Hare,
Helveston & Waldman, P.C.
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

THE INLAND PRESS, DETROIT, MICHIGAN
105

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Introduction	1
A. Respondents' Brief in Opposition Misstates the Facts and the Issue	2
B. Respondents Misstate the Law of ERISA Preemption as Set Forth in ERISA Section 514 and *Metropolitan Life*.	2
C. Respondents' Argument is Undercut by the Michigan Statute which Respondents Administer.	6
D. Respondents' Argument Demonstrates the Need for Review of the Decision Below.	8
Conclusion	9

TABLE OF AUTHORITIES

Cases: *Page*

Dawson v *Whaland*, 529 F. Supp. 626 (D. N.H. 1982) 5

General Electric Company v *Gilbert*, 429 U.S. 125 (1976), *reh. den.* 429 U.S. 1079 5

General Split Corporation v *Mitchell*, 523 F.Supp 427 (ED. Wi. 1981) 5

Metropolitan Life Insurance Co. v *Commonwealth of Massachusetts*, 471 U.S. ____, 105 S. Ct. 2380 (1985)..... passim

St. Paul Electrical Workers v *Markman*, 490 F. Supp. 931 (D. Minn. 1980) 5

Statutes:

Employee Retirement Income Security Act of 1974, 29 U.S.C. (& Supp.) 1001 *et seq.*

Section 514, 29 U.S.C. 1144 ..... 3, 5

Section 514(a), 29 U.S.C. 1144(a) 2, 5, 8

Section 514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A) 3

Section 514(b)(2)(B), 29 U.S.C. 1144(b)(2)(B) 3

Section 514(b)(6), 29 U.S.C. 1144(b)(6) 3, 4

Michigan Insurance Code of 1956, M.C.L.A. § 500.3400 *et seq.*; M.S.A. § 24.13400 *et seq.* as amended by 1980 Michigan Public Act No. 425 ..... 2, 7, 8

Michigan Insurance Code of 1956, M.C.L.A. § 500.100 *et seq.*; M.S.A. § 24.1100 *et seq.*

M.C.L.A. § 500.5208; M.S.A. § 24.15208 6

M.C.L.A. § 500.5208a; M.S.A. § 24.15208a 6

Michigan Nonprofit Health Care Corporation Reform Act, as amended, M.C.L.A. § 550.302 *et seq.* 6

M.C.L.A. § 550.312b; M.S.A. § 24.602(2) 6

Miscellaneous:

Conference Committee Report, 97th Cong. 2d sess., 128 Cong. Rec. H. 10650 (daily ed. Dec. 21, 1982) 4

No. 85-810

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

MICHIGAN UNITED FOOD AND COMMERCIAL WORKERS UNIONS AND FOOD EMPLOYERS HEALTH AND WELFARE FUND, and the BOARD OF TRUSTEES thereof; and MICHIGAN UNITED FOOD AND COMMERCIAL WORKERS UNIONS DRUG AND MERCANTILE EMPLOYEES WELFARE FUND, and the BOARD OF TRUSTEES thereof,

Petitioners,

v.

NANCY A. BAERWALDT, COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN; JEAN CARLSON and THOMAS PIERSON, DEPUTY COMMISSIONERS OF INSURANCE OF THE STATE OF MICHIGAN; and THE BUREAU OF INSURANCE OF THE STATE OF MICHIGAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONERS

The Funds submit that the argument for the granting of certiorari is sufficient as presented in the Petition. This Reply Brief is prompted by the need to address a number of potentially misleading misstatements of fact and law contained in Respondents' Brief in Opposition.

A. **Respondents' Brief in Opposition Misstates the Facts and the Issue.**

After asserting in their Statement of the Case that, "[r]espondents simply do not know" the factual details underlying the Funds' contractual relationship with Transamerica Occidental (Brief in Opposition, p. 1), respondents nevertheless presume an exegesis on the history and coverage of the Funds' excess loss insurance arrangements (pp. 1-2).

Respondents' conclusory statement therein that, "[p]etitioners are insured by policies issued by Transamerica," (Brief, p. 3) is grossly misleading. The simple fact is that the Funds are not insured below the "claims liability limit," and they do not pay premiums for benefits paid below that limit. Moreover, the "claims liability limit" has never been reached in the history of the Funds' Flexible Funding Agreement with Transamerica.

The issue here, then, affecting countless employee benefit plans, is whether an uninsured, i.e., self-funded plan, otherwise concededly insulated from state regulation by §514(b) of ERISA, becomes subject to such regulation either as to the *excess* insurance coverage it purchases, or as to the plan as a whole (as respondents may (mis)read the Sixth Circuit to say).

B. **Respondents Misstate the Law of ERISA Preemption as Set Forth in ERISA Section 514 and *Metropolitan Life*.**

By means of a stilted and erroneous reading of ERISA and the Court's opinion in *Metropolitan Life Insurance Company* v *Commonwealth of Massachusetts*, 471 U.S. ____ , 105 S.Ct. 2380 (1985), the Insurance Commissioner attempts to persuade the Court that review of the Sixth Circuit's opinion is not necessary.

First, respondents argue simplistically that because Michigan Public Act 429 regulates insurance, and because laws regulating insurance are shielded from federal preemption by the "insurance saving clause," Act 429 escapes preemption and can be applied to the Funds; this *reductio* purportedly "ends the

inquiry" (pp. 9-10 of Respondents' Brief). This syllogism conveniently blinks reality. The plain rationale for Congress' inclusion of the "deemer" clause in Section 514 was to foreclose precisely such a result. The deemer clause makes it clear that it is respondents who have "incorrectly framed the question." The scope of ERISA preemption does *not* simply focus, as respondents assert (at p. 9), on the state law allegedly preempted. It could not be plainer from this Court's opinion in *Metropolitan Life, supra*, that the *deemer clause* modifies and limits the "insurance saving clause."

The deemer clause operates to focus inquiry precisely on the nature of the affected party and the nature of the insurance coverage, if any. This is plainly so from the Court's statement in *Metropolitan Life* that, "the distinction between *insured and uninsured plans*, leaving the former open to indirect regulation while the latter are not," is one "created by Congress in the 'deemer clause.' " *Metropolitan Life, supra*, 105 S. Ct. at 2393 (emphasis added). The decision below, as apparently construed by respondents, impermissibly opens the Funds, even to the extent they are *uninsured*, to the regulation of benefits that Congress and this Court have declared prohibited by ERISA's preemption and deemer provisions, thereby gravely misapplying *Metropolitan Life*.

Second, respondents' assertion (at page 8 of Brief in Opposition) that, "Congress simply did not differentiate in §514(b)(2)(A)" between indirect local regulation of fully insured plans and local regulation of marginally insured—and essentially uninsured—employee benefit plans, such as the Funds, completely misses the point, by ignoring §514(b)(2)(*B*), the deemer clause. The deemer clause, as this Court declared in *Metropolitan Life*, expresses Congress' intention that state regulation, through insurance laws, of ERISA plans is preempted at least to the extent that the plans are *uninsured*.

Third, respondents' lengthy exposition on the 1982 amendment to ERISA, Section 514(b)(6), succeeds only if their

intention was to obfuscate the issue. The Funds have not asserted and do not assert that they are "multiple employer welfare arrangements" (MET's) subject to ERISA Section 514(b)(6). That section is material, however, because it demonstrates Congress' understanding that the deemer clause preempts state insurance regulation of all ERISA plans that are not "fully insured." When Congress carved an exception to this rule, it did so expressly in Section 514(b)(6)(A)(ii). Thus, although respondents attribute to us reliance on "some obscure congressional intention to distinguish generally between fully insured and partially insured employee benefit plans" (Brief, p. 15), the 1982 enactment *expressly* distinguishes, section by section, between "fully insured" and other "multiple employer welfare arrangements."[1] Respondents do concede that the 1982 amendments were intended to extend local regulation to "multiple employer welfare arrangements" that are also ERISA plans and thereby otherwise protected from state insurance law by the deemer clause. (Respondents' Brief, p. 12). Congress clearly acknowledged the deemer clause's protection of *all but fully-insured* plans by expressly authorizing full application of local insurance law, and the inapplicability of the deemer clause, to those plans, in Section 514(b)(6)(A)(ii). Respondents simply cannot effectively obscure what a straight-forward application of statutory construction reveals: Congress' intention to shelter from state insurance regulation those employee benefit plans (other than "multiple employer welfare arrangements") which do not fund benefits completely through an insurance policy, at least to the extent they are self-funded, i.e., not insured.

---

[1]Respondents gloss over this distinction in their discussion, but it is clear that the differentiation of fully insured from partially insured multiple employer welfare arrangements was central to Congress' purpose:

> "The provision generally exempts certain multiple employer welfare arrangements from the ERISA preemption provision.

Finally, the conclusion that self-funded employee welfare benefit plans carrying marginal excess loss insurance coverage are effectively *uninsured* for purposes of ERISA preemption is the *only* one which harmonizes with the Court's teaching in *Metropolitan Life*. Respondents attempt to undercut this sensible approach, and self-servingly bolster the erroneous opinion by the Sixth Circuit, by arguing in a vacuum, focusing exclusively on the insurance saving clause. (Brief at p. 10). Respondents' one-dimensional analysis merits scant consideration, since it plainly ignores the other sub-sections of Sec. 514, which, as *Metropolitan Life* demonstrates, must be read coordinately. When Section 514(a) is read in conjunction with the insurance saving clause and the deemer clause, it is apparent that where the Trustees have endeavored to protect Fund assets through the purchase of excess loss or stop loss insurance policies, the Funds are not transfigured into fully-insured benefit plans thereby subject to state insurance law. *General Electric Company* v *Gilbert*, 429 U.S. 125, 128 n. 3 (1976), *reh. den.* 429 U.S. 1079; *Dawson* v *Whaland*, 529 F. Supp. 626 nn 3, 4 (D. N.H. 1982); *General Split Corporation* v *Mitchell*, 523 F. Supp. 427, 430 (E.D. Wi. 1981); *St. Paul Electrical Workers* v *Markman*, 490 F. Supp. 931, 933 (D. Minn. 1980).

In the case of a fully insured multiple employer welfare arrangement, the provision exempts from ERISA preemption any State laws that require the maintenance of specified levels of reserves and contributions in order for such an arrangement to be considered adequately funded.

In the case of a multiple employer welfare arrangement that is not fully insured, the provision exempts from ERISA preemption any State laws that regulate insurance. Notwithstanding this provision, the secretary is authorized to determine the extent to which the ERISA preemption provision will be applied to a multiple employer welfare arrangement that is not fully insured. The Secretary's determination may be made on a case-by-case basis or a class basis."

Report of Conf. Committee, 128 Cong Rec H 10,650 (daily ed. December 21, 1982).

C. Respondents' Argument is Undercut by the Michigan Statute Which Respondents Administer.

Ironically, the treatment of the Funds as uninsured below the "claims liability limit," which respondents surprisingly characterize as "sophistry" (at p. 4 of the Brief in Opposition), is codified throughout the very law respondents are mandated to administer.

Under the Michigan Insurance Code of 1956, M.C.L.A. §500.100, *et seq.;* M.S.A. §24.1100, *et seq.*, special provisions added in a 1981 amendment, 1981 PA 189, M.C.L.A. §§500.5208(2)-(6),.5208a; M.S.A. §§24.15208(2)-(6).,15208a, apply to insurers of "noninsured benefit plans."

A "noninsured benefit plan" is defined, *inter alia*, as "*the noninsured portion of a benefit plan which has specific or aggregate excess loss insurance.*" M.C.L.A. §500.5208(7); M.S.A. §24.15208(7), as amended; see also, M.C.L.A. §500.5208a(a); M.S.A. §24.15208a(a).[2] Hence, the Michigan Legislature has adopted precisely the definition of uninsured benefit plan which the Funds suggest is minimally appropriate and which the Insurance Commissioner rejects with innuendo and without substantive reasons.

The insurer of a "noninsured benefit plan" must offer a program of specific or aggregate excess loss insurance. M.C.L.A. §500.5208(2)(b); M.S.A. §24.15208(2)(b). Significantly, an insurer's provision of excess loss coverage for a "noninsured benefit plan" qualifies as "a business activity which is *not an insurance*

---

[2]This definition of "noninsured benefit plan" is consistent throughout the Michigan statutes. The Michigan Nonprofit Health Care Corporation Reform Act, which regulates provision of administrative services by medical care corporations to benefit plans, defines "noninsured benefit plan" in its Section 12b as: ". . . the portion of a health benefit plan without insurance or without coverage by a medical care corporation or hospital service corporation which has specific or aggregate excess loss insurance or coverage." M.C.L.A. §550.312b; M.S.A. §24.602(2).

carrier service" under the Code. M.C.L.A. §500.5208(4); M.S.A. §24.15208(4), as amended.[3]

Thus, it is respondents who should seek relief from the Michigan Legislature if they truly consider characterization of the Funds as "noninsured" below the claims liability limit of their excess loss insurance to be a "fiction," because this is precisely the "fiction" encoded in the insurance law of Michigan. The Michigan Insurance Code underscores the logic of considering the Funds, at the least to the extent that they are self-funded, as *uninsured* and therefore protected from application of Act 429 under the reasoning of *Metropolitan Life*.

---

[3]Section 5208 of the Michigan Insurance Code of 1956 states in material part:

(1) The corporate powers of each insurer incorporated in this state shall be limited to the issuance of policies insuring persons or property or other hazards in the state of domicile and in other states from which it has received authority to transact insurance business from the insurance department of such state, and to the provision of services of the kind it performs in the normal conduct of its insurance business whether or not such services are performed in connection with an insurance contract. The prohibition of this section shall not apply to insurers organized in compliance with the insurance laws of this state, which cannot be properly authorized in other states, because the laws of such states do not permit the writing of the class or kind of insurance written by such insurers.

(2) For services provided under subsection (1) which are performed in connection with a noninsured benefit plan, the following standards shall be met:

* * *

(b) Any insurer providing services described in subsection (1) may write, and in connection with a noninsured benefit plan shall offer a program of, specific or aggregate excess loss insurance.

* * *

(4) Services provided under subsection (1) which are performed in connection with a noninsured benefit plan shall be considered a business activity which is not an insurance carrier service and shall be subject to tax as authorized by the single business tax act, Act No. 228 of the Public Acts of 1975, as amended, being sections 208.1 to 208.145 of the Michigan Compiled Laws.

* * *

(7) As used in this section, "noninsured benefit plan" or "plan" means a benefit plan without insurance or the noninsured portion of a benefit plan which has specific or aggregate excess loss insurance.

M.C.L.A. §500.5208; M.S.A. §24.15208.

D. Respondents' Argument Demonstrates the Need for Review of the Decision Below.

Respondent Insurance Commissioner's argument is compelling evidence that review of the Sixth Circuit's decision should be granted. Respondents unwittingly demonstrate precisely the danger which we argue is an inevitable and impermissible result of the Sixth Circuit's misreading of *Metropolitan Life* — that the "insurance saving" exception will be leveraged to swallow the broad preemption rule of ERISA's Section 514(a).

The Sixth Circuit's opinion is open to two readings — both untenable and in conflict with the teaching of *Metropolitan Life* (Petition for Certiorari, pp. 8-9); respondents apparently interpret the Sixth Circuit's opinion to support application of Act 429 to *the Fund as a whole*, not solely to the insurer's coverage of excess claims. This plainly erroneous result is evidenced by the startling suggestion that the *Funds* should seek an exemption from application of a mandated benefits law purportedly applicable to insurers only! (Brief in Opposition, p. 8).

That the Insurance Commissioner could so easily and wrongly conclude from the Sixth Circuit's opinion that the Funds can escape the mandated benefits of Act 429 only by becoming *completely self funded* (Brief, p. 8)—a risky alternative undertaken only by only a small number of the largest employee benefit plans—is persuasive evidence of the need for review and correction by this Court. The fact that, as we have argued, the Sixth Circuit's ruling permits the insurance saving exception to swallow the rule of broad ERISA preemption is an unanswerable argument for review.

CONCLUSION

Petitioners assert that the Petition for Writ of Certiorari should be granted. Respondents' arguments do not diminish the conclusion that the Court of Appeals has misapplied the holding in *Metropolitan Life, supra,* in a manner that merits review by this Court.

Respectfully submitted,

THEODORE SACHS (P19827)
Attorney for Petitioners
Sachs, Nunn, Kates, Kadushin, O'Hare,
Helveston & Waldman, P.C.
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

December 16, 1985